86-685

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. CRISWELL,

Petitioner,

v.

BALTIMORE & OHIO RAILROAD COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RICHARD R. BEAUCHEMIN
NORRIS W. TINGLE
GEOFFREY J. C. BOYD

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QUESTIONS FOR REVIEW

I. Whether the District Court denied petitioner a fair trial by: (1) its evidentiary rulings which permitted the admission into evidence of the CJ68 form as an admission against interest of petitioner despite overwhelming evidence that it did not constitute such an admission, and (2) compounding, its error through the court's own subsequent actions?

II. Whether the District Court and the Fourth Circuit Court of Appeals effectively denied petitioner his Seventh Amendment, Constitutional right to a jury trial?

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FOR THE FOURTH CIRCUIT

OPINION OF THE COURT BELOW

The unpublished Opinion of the U.S. District Court for the District of

Maryland and its Order granting respondent's Motion for Judgment Notwithstanding the Verdict are set forth verbatim in the appendix at pages 8 - 22. The unpublished opinion of the U.S. Court of Appeals for the Fourth Circuit is set forth verbatim in the appendix at pages 1 - 4.

PETITION FOR WRIT OF CERTIORARI

The Petitioner, James E. Criswell, by Arnold, Beauchemin & Tingle, P.A., Norris W. Tingle, Richard R. Beauchemin, and Geoffrey J.C. Boyd, his attorneys, respectfully requests that a Writ of Certiorari issue to review the per curiam decision of the United States Court of Appeals for the Fourth Circuit in the instant case. James E. Criswell v. The Baltimore & Ohio Railroad Company, Inc., No. 85-1769 (C.A. 4 Aug.

5, 1986).

JURISDICTIONAL GROUNDS

The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

Constitutional Provisions
United States Constituion,
Seventh Amendment

In Suits at common law, where the value in controversey shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States than according to the rules of the common law.

Statutes

45 U.S.C., Sec. 51

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence;

definition of employees

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed,

works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; August 11, 1939, c. 685, Sec. 1, 53 Stat, 1404.

45 U.S.C., Sec. 53.

Contributory negligence; diminution of damages.

In all actions on and after April 22, 1908 brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such

injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

April 22, 1908, c. 149, Sec. 3, 35 Stat. 66.

45 U.S.C., Sec. 54. Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case

where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

April 22, 1908, c. 149, Sec. 4, 35 Stat. 66; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat 1404.

45 U.S. C., Sec. 55. Contract rule, regulation, or device exempting from liability; set-off.

Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void: Provided, That in any action brought against any such common carrier under or by virtue of any of the provisions of this

chapter, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought.

April 22, 1908, c. 149, Sec. 5, 35 Stat. 66.

STATEMENT OF THE CASE

Petitioner, James E. Criswell, an employee of the Baltimore & Ohio Railroad Company, had his left hand blown off by a "pipe" bomb which he found and picked up on December 11, 1981, while he was at work upon his employer's premises. Mr. Criswell ultimately filed a claim under the Federal Employer's Liability Act (The F.E.L.A.), 45 U.S.C., Sec. 51 et seq.,

in the United States District Court for the District of Maryland on February 27, 1984, seeking compensation for lost wages and personal injury from his employer, the B & O. The matter was tried on April 29th through May 2nd, 1985 before a jury which returned a verdict on behalf of the employee in the amount of $500,000.00. The jury found that the employer, B & O was 12% negligent and that the employee was 88% negligent. Accordingly, on May 3, 1985, judgment was entered in favor of employee and against the B & O in the sum of Sixty Thousand ($60,000.00) Dollars.

On or about May 13, 1985, a Motion for Judgment Notwithstanding the Verdict was filed by the B & O, to which Criswell filed a timely answer. A

hearing on the Motion was held on June 7, 1985, at the conclusion of which the court, in an oral opinion, granted the B & O's Motion for Judgment Notwithstanding the Verdict. From the verdict of the jury and the grant of the B & O's Motion for Judgment Notwithstanding the Verdict, Criswell filed a timely appeal. The issues were briefed and oral argument had on May 5, 1986, before a three judge panel in the U.S. Court of Appeals for the Fourth Circuit. An unpublished, per curiam, one page opinion was issued on August 5, 1986, in which the Court of Appeals affirmed the grant of a judgment notwithstanding the verdict in favor of the Defendant/Appellee, B & O, based upon the District Court's determination that the fabrication of bombs was not

reasonably foreseeable. As a result of the affirmation of the grant of the j.n.o.v., the appellant, James C. Criswell has filed a timely petition for Writ of Certiorari.

ARGUMENT

The U.S. District Court for the District of Maryland in its determination of this case has clearly violated the tenets laid down by this Court in Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) and Gallick v. B & O R.R. Co., 372 U.S. 108 (1963), and the affirmance by the U.S. Court of Appeals for the Fourth Circuit has so far sanctioned this violation of the tenets of this Court as to necessitate the exercise of this Court's supervisory power so as to insure uniformity of decision under the Federal Employer's

Liability Act, 45 U.S.C., Sec. 51 et. seq. (the "F.E.L.A.").

I. PETITIONER WAS DENIED A FAIR TRIAL BY THE COURT AS A RESULT OF (1) ITS RULING WHICH PERMITTED THE ADMISSION INTO EVIDENCE OF THE "CJ68" INCIDENT REPORT AS AN ADMISSION AGAINST INTEREST DESPITE OVERWHELMING EVIDENCE THAT THE DOCUMENT COULD NOT CONSTITUTE SUCH AN ADMISSION, AND (2) ITS ACTIONS, WHICH GAVE THE IMPRIMATURE OF APPROVAL BY THE COURT, TO THE JURY.

The right to a fair trial by jury which is guaranteed under the Seventh Amendment to the Constitution of the United States,

> ...is a basic and fundamental feature of our system of federal jurisprudence. [citation omitted]. It is a part and parcel of the remedy

> afforded railroad workers under the Employers' Liability Act.
>
> * * *
>
> To deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.

Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 354 (1943); Blair v. Baltimore & Ohio R.R. Co., 323 U.S. 600, 602 (1945); Rogers v. Missouri Pac. R.R. Co., 352 U.S.500 (1957).

In the instant case, the B & O employee report of accident (form CJ68), filled out by the railroad's safety officer, was admitted into evidence as an admission against interest of petitioner and was used by the railroad as a device to exculpate itself from

liability in violation of 45 U.S.C., Sec. 55.

Rinaldi, the railroad's safety officer visited the 26 year old petitioner in his hospital room, two and one half days after the emergency surgical amputation above the wrist of the fragmented remains of petitioner's left hand, which had been blown off by a pipe bomb constructed by a fellow employee. At the time of the safety officer's visit, petitioner was still regularly receiving injections of narcotic analgesics for pain and, petitioner's own testimony established that he did not have the state of mind to understand the significance of his signature on the CJ68 form (Employee's Report Covering Injury or Occupational Illness) which the safety officer

requested him to sign. Petitioner's lack of ability to appreciate the significance of his actions is further borne out by the fact that his signature appears scrawled, between the lines of the safety officer's hand-written narrative, in the middle of the page, instead of on the signature line at the bottom of the page where it was intended that it should be placed. The form was filled out entirely by the safety engineer, without the presence of witnesses as required by the instructions upon the form itself. The petitioner never read the narrative of the incident in which he lost his hand as recorded on the CJ68 form and recanted that version of the facts shortly afterward when he was no longer under the influence of narcotic drugs.

The overwhelming evidence of the blatant falsity of the document in regard to both its content and its execution should have prevented it from being admitted into evidence at trial for any purpose whatsoever, however, the trial court denied petitioner's motion in limine asserting inadmissability and prejudice, and presented the form to the jury representing it as an admission of the petitioner. The presentation of this form into evidence as an admission against interest was a gross and outrageous perversion of the evidence and was highly prejudicial to appellant's case. The prejudical effect of this document upon the jury is reflected in the finding by the jury of 88% contributory negligence on the part

of petitioner, after having rendered a verdict in favor of petitioner in the amount of five hundred thousand dollars.

The trial court further compounded this gross perversion of the evidence through the trial judge's command in the presence of the jury, that his clerk personally photocopy the form and distribute the copies of the CJ68 to each of the jurors, thereby, through its eager embracing of the document, placing the court's approval and imprimature of legitimacy upon the document. The unfair and prejudicial effect upon the jury of the admission of this document into evidence as an admission against interest of petitioner, acted to deny petitioner a fair trial of the matters at issue.

The CJ68 form itself clearly

constitutes a violation of 45 U.S.C., Sec. 55 which states, in pertinent part, that:

> Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter shall to that extent be void...

The CJ68 form in numbered items, ten through fourteen, does not seek to merely solicit the facts surrounding the incident, but rather, seeks responses by the injured employee to questions which have the specific legal effect of exempting the railroad from liability, despite its negligence. Completion of the form by the injured employee is mandatory under the railroad's general safety rule number one, and the form is

to be completed as soon as possible after the accident/incident. The injured employee, who is primarily concerned with his job security and his own well being, ordinarily does not have the benefit of counsel when completing the CJ68 form, while the form itself was clearly designed by someone with an intimate familiarity with the legal issues involved in a personal injury claim under the F.E.L.A. The form, for example, in item ten, asks (A) Was anyone at fault? (B) If so, who, and in what manner?" Item eleven asks "(A) Was equipment or tool defective? (B) If so, describe and specify defect." Item twelve asks "(A) Did injured/occupationally ill person have a safe place in which to work?" Item thirteen asks "(A) Was work place

adequately lighted? (B) If not, describe conditions." Item fourteen asks "Was there any failure to give usual or necessary signals, warnings, or protection?"

The answers to these questions strike straight at the heart of the legal issues involved in an injured employee's claim under the F.E.L.A. and are used against the injured employee, as defenses by the railroad, to typical allegations of negligence on the part of the employer. The prejudicial misuse of the CJ68 form in this case, as an admission against interest of petitioner, in which answers were manufactured by the employer's safety engineer after a signature had been obtained under abusive circumstances from the injured petitioner, was clearly

prejudicial error. Its effect was reflected in the finding by the jury of 88% contributory negligence on the part of petitioner.

II. PETITIONER WAS EFFECTIVELY DENIED HIS CONSTITUTIONAL RIGHT TO A JURY TRIAL THROUGH THE GRANT OF THE B & O'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BY THE U.S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND AND THROUGH THE AFFIRMANCE OF THAT ACTION BY THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT.

The grant of the B & O's Motion for Judgment Notwithstanding the Verdict ("J.N.O.V.") based upon the Court's determination of (1) a lack of foreseeability of harm and (2) that petitioner was not within the scope of his employment when injured, improperly

invaded the jury's historic function and effectively denied to petitioner his Seventh Amendment, Constitutional right to a jury trial, and deprived him of "a goodly portion of the relief which Congress has afforded [him under the F.E.L.A.]. Bailey v. Central Vermont Ry., Inc., 319 U.S. 350, 354 (1943). The District Court stated the correct standard in its oral, bench opinion for the grant of a motion for J.N.O.V., but then failed to apply that standard when it stated that:

> [t]he commentators indicate that the stringent standards for judgment notwithstanding the verdict pursuant to F.R. Civ. P. 50 are even more difficult to meet in an F.E.L.A. case
>
> See 9 Wright & Miller, Federal Practice and Procedure, Sec. 2526.

The test of whether an F.E.L.A. case should be submitted to the jury is simply

> whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death. Judges are to fix their sights primarily to make that appraisal and, if that test is met, are bound to find that a case for the jury is made

> out whether or not the evidence allows the jury a choice of other probabilities. The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part to its negligence.'

Rogers v. Missouri Pac. Ry., 352 U.S. 500, 506 (1957). There are, thus only very limited circumstances in which the court can substitute its judgment, as a matter of law, for the verdict of the jury in an F.E.L.A. case. The District Court, erroneously, proceeded to do precisely that - to substitute its judgment, as a matter of law, for the verdict of the jury, despite the fact that there was evidence to substantiate the jury's verdict. In its summary of the evidence in its oral opinion granting the motion for J.N.O.V., the court failed to even consider

substantial evidence which was favorable to the plaintiff and, when viewed objectively, clearly appears to have viewed the relevant evidence, erroneously, in the light most favorable to the movant, the B & O.

With regard to the issue of scope of employment, the court failed to consider the following: (1) that the heavy work being performed required two or three man gangs in order to be safely and properly performed; (2) that petitioner's gang leader had instructed him that he was to "hang loose, stick around. We are not going to do a whole lot today"; (3) that petitioner, in accordance with his gang leader's instructions, remained on the premises, on the jobsite, and on the payroll of B & O while awaiting further orders from

his gangleader; (4) that while awaiting such instruction, he occupied his time by picking up scrap metal material which littered the workyard; (5) there was absolutely no evidence presented whatsoever, that he was not ready, willing and able to resume work whenever his workleader indicated that the rest of his work gang was ready to proceed.

With regard to the issue of foreseeability of harm, the court specifically found "that a jury could rationally infer that B & O did not use reasonable care in storing the torpedos."1

---

1 "A railroad torpedo is a coated brown paper package, two inches square and a half inch thick, with a strip of metal running through it to hold it in place on a railroad track. The package contains an explosive charge and sand. When it is affixed to a track it is detonated - in a sense ignited - by the

Its summary of the evidence on this issue included: (1) that management was aware of horseplay during the week preceding the accident, (2) that a foreman broke up a rock battle among the employees, (3) that the employees were not supervised during the week preceding the accident, (4) that the employees did not always have work to occupy them, (5) that torpedos were widely available during the period, and (6) that a number of audible explosions occurred in the sandblast area [of the workplace] in the days preceding the

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(f.n. cont'd.)
weight of the train mixing the sand with the chemicals. The explosion sounds a warning of trouble ahead to the engineer." Prata v. Nat'l. R.R. Passenger Corp., 420 N.Y.S. 2d 276 (1979).

accident. The court summarily concluded that the fabrication of an explosive device from torpedos was not reasonably foreseeable, despite management's knowledge of conventional horseplay. "Reasonable forseeability of harm is an essential ingredient of Federal Employers' Liability Act negligence." Gallick v. B & O R.R. Co., 372 U.S. 108, 117 (1963), and cases cited therein. Foreseeability of harm "is no less a matter generally left to the jury's broad decision than any other part of the requisite proof to recover under the F.E.L.A.", Gallick, supra, moreover, a jury is not compelled to find that a third-party's unlawful conduct which resulted in harm to an employee of the railroad was not foreseeable. Burns v. Penn Central Co., 519 F.2d 512, 514 (2d.

Cir. 1975), citing Lillie v. Thompson, 332 U.S. 459 (1947). In this case the harm to James Criswell was not the result of a criminal or an intentional act of a third party. There was corroborating testimony to substantiate Criswell's account of having found this piece of pipe near the shanty and of his having carried it to the boxcar in which the Martz brothers were working in order to inquire as to its nature and ownership. His injury resulted from the explosion caused by detonation of the device due to his fall in the boxcar. This, indeed, is not the first time that a railroad torpedo has blown off the hand of a railroad employee. See Prata v. Nat'l. R.R. Passenger Corp., 70 A.D. 2d 114, 420 N.Y.S. 2d 276 (1979). The jury was specifically

instructed on the issues of foreseeability of harm and scope of employment, and there was evidence which supported the jury verdict in favor of the petitioner. The District Court improperly invaded the jury's function, in direct contradiction of the legal tenets expressed by this Court, and insodoing denied petitioner his right to a jury trial, when it ruled, as a matter of law, that (1) the petitioner was not acting within the scope of his employment and (2) that the harm to petitioner was not foreseeable. See Gallick, supra. Clearly, such is an entirely too narrow and restrictive an interpretation of concepts of foreseeability and scope of employment. This is especially so in an F.E.L.A. case, in which such questions of fact

should be approached in the light of the language of Mr. Justice Butler in Jamison v. Encarnacion, 281 U.S. 635 (1930), where he declared:

"The act is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word [negligence] may be read to include all the meanings given to it by courts, and within the word as ordinarily used."

CONCLUSION

For the aforegoing reasons, Petitioner prays that a Writ of Certiorari issue to the United States Court of Appeals for the Fourth Circuit and that its decision and that of the

U.S. District Court for the District of Maryland be reversed.

Respectfully submitted,

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(301) 837-0215

Attorneys for Petitioner

I HEREBY CERTIFY That on this 27th day of October, 1986, three copies of the aforegoing Petition for Certiorari were hand-delivered to Ransom Davis, Esquire, and Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., 36 S. Charles Street, 6th Floor, Baltimore, Maryland 21201-3060.

Richard R. Beauchemin

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PETITION FOR WRIT OF CERTIORARI
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OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX

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OPINION OF THE COURT BELOW

JAMES E. CRISWELL,

Appellant

versus

THE BALTIMORE & OHIO RAILROAD COMPANY,
A body corporate,

Appellee.

No. 85-1769

United States Court of Appeals,

Fourth Circuit.

Argued May 5, 1986

Decided August 5, 1986

Richard R. Beauchemin (Norris W. Tingle ;Geoffrey J.C. Boyd; Arnold, Beauchemin &Tingle, P.A. on brief) for Appellant.

Ransom J. Davis (H. Russell Smouse; Nancy S. Allen; Melnicove, Kaufman, Weiner& Smouse, P.A.; C. Keith Meiser on brief)for Appellee.

Before CHAPMAN and WILKINSON,

Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

PER CURIAM:

This case is the result of a tragic accident at a railroad car repair shop. During a slack period in the shop's operations, some workers amused themselves by making small pipe bombs with powder from signal torpedos, which are explosive charges used to warn of oncoming trains. On December 11, 1981, one of the pipe bombs exploded in the hands of James Criswell, a welder at the repair shop. As a result, Criswell lost his left hand.

Criswell sued the railroad under the Federal Employers' Liability Act. Following a jury trial, the district court awarded $60,000 to

Criswell. The railroad then moved for a judgment notwithstanding the verdict. The district court granted the railroad's motion on the grounds that the fabrication of bombs at the repair shop was not reasonably foreseeable and that the accident occurred when Criswell was acting outside the scope of his employment, scavenging metal parts for his own use.

Criswell now appeals on a variety of grounds. We reach only the issue of foreseeability, however. Because the district court properly found that the fabrication of bombs was not reasonably foreseeable, the railroad cannot be held negligent even when we take the facts in the light most favorable to the plaintiff. We therefore affirm the decision of the

district court. James E. Criswell v. The Baltimore & Ohio Co., C/A No. 85-1769 (D. Md. June 7, 1985).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES E. CRISWELL	*	
Plaintiff	*	
vs.	*	Civil Action No.
THE BALTIMORE & OHIO RAILROAD CO	*	HM-84-752
Defendant	*	

* * * * * * *

ORDER

THIS COURT having read and considered the Motion for Judgment Notwithstanding the Verdict, and Memorandum of Points and Authorities in support thereof, filed by Defendant, The Baltimore and Ohio Railroad Company, pursuant to Rule 50(b) of the Federal

AND THIS COURT also having read and considered the Answer to Motion for Judgment Notwithstanding The Verdict, and Memorandum of Points and Authorities, filed by the Plaintiff, James E. Criswell;

AND THIS COURT having heard and considered the arguments of counsel for the parties at a hearing on Friday June 7, 1985;

AND THIS COURT having determined that Defendant's Motion must be granted, for the reasons expressed in the opinion of the Court read at the conclusion of the hearing.

NOW, THEREFORE, IT IS ORDERED this 13th day of June, 1985, that:

1) Defendant's Motion for Judgment Notwithstanding The Verdict be and hereby is Granted; and

2) Judgment shall be entered in favor of Defendant together with costs.

HERBERT F. MURRAY

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JAMES E. CRISWELL,)

v.) Case No. HM84-752
Civil Action

THE BALTIMORE &)
OHIO RAILROAD CO.

)

Baltimore, Maryland
June 7, 1985

The above-entitled case came on for Hearing on Defendant's Motion for Judgment Notwithstanding the Verdict before His Honor, Herbert F. Murray, at 11:30 a.m.

E X C E R P T

BENCH OPINION

of

THE HONORABLE HERBERT F. MURRAY

A P P E A R A N C E S

For the Plaintiff:

Richard R. Beauchemin and
Norris W. Tingle

For the Defendant:

Ransom J. Davis and
Nancy Allen

Reported by: S.M. Lee Schap
Official Court Reporter

EXCERPT FROM TRANSCRIPT OF PROCEEDINGS

THE COURT: Presently pending in this Federal Employers' Liability Act ("FELA"), 45 U.S.C. Sec. 51 et seq. case is Defendant Baltimore and Ohio Railroad Company's motion for judgment notwithstanding the verdict. Plaintiff James E. Criswell opoposes the motion. The Court has held a hearing on the matter on Friday, June 7, 1985 and is

now prepared to rule. For the reasons stated herein, the Court will grant the Defendant's motion.

Mr. Criswell is a former employee of Defendant B & O. He worked as a carman-welder at Defendant's yard in Brunswick, Maryland. On December 11, 1981, a homemade "bomb," fabricated from a pipe sleeve and torpedo powder, exploded in Mr. Criswell's hand. Mr. Criswell subsequently underwent a hand amputation because of the severity of his injury. He brought the instant case against B & O to recover for those injuries.

The jury trial in this matter began on April 29, 1985 and concluded May 2, 1985. After brief deliberations, the jury returned a verdict for Plaintiff for $500,000. The Court

subsequently entered judgment for Mr. Criswell for $60,000, or twelve percent of the $500,000 verdict, pursuant to the jury's determination that Plaintiff was 88 percent, and Defendant 12 percent responsible for the accident. By the instant motion, B & O seeks entry of judgment in its favor.

The commentators indicate that the stringent standards for judgment notwithstanding the verdict pursuant to F.R. Civ. P. 50 are even more difficult to meet in an FELA case. See 9 C. Wright & A. Miller, Federal Practice and Procedure, Sec. 2526. For example, the Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn, either about how the accident happened or about whether the Defendant's conduct

was negligent, it is for the jury to accept or reject that inference, even though the inference may be quite an improbable one. See Lavender v. Kurn, 327 U.S. 645, 652 to 53 (1946). Citing an earlier Supreme Court case, the District of Columbia Circuit has observed:

"The test whether an FELA case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought'." Brooks v. Washington Terminal Co., 593 F.2d 1285 at 1288 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979),quoting, Rogers v. Missouri Pacific Railway, 352 U.S. 500 at 506

(1957).

Recognizing the difficult standard it must meet, the B & O nonetheless argues that Plaintiff failed to prove two necessary elements of an FELA case, that he was acting within the scope of his employment and that B & O was negligent. I'll deal first with the issue of negligence.

B & O first asserts that the evidence, when viewed in light most favorable to the Plaintiff, indicates that it used reasonable care in storing the torpedos. It notes that torpedos have a legitimate safety purpose, to wit: to warn track work crews of an oncoming train. It also asserts that the torpedos were kept in locked cabooses and in a guarded store room. The Court notes that there was also

evidence that unauthorized employees had keys to the cabooses, that torpedos were lying near the main track in the Brunswick yard, and that torpedos were sometimes left in unlocked Amtrack passenger cars. Viewing the evidence in the light most favorable to Mr. Criswell, the Court finds that a jury could rationally infer that B & O did not use reasonable care in storing the torpedos.

Assuming the torpedos were available to unauthorized persons, such as Mr. Criswell and his co-workers, B & O argues this availability did not create an unreasonably dangerous workplace. B & O's uncontradicted testimony showed that the torpedos are not inherently dangerous equipment requiring special handling. They

explode only if struck with force such as by the wheel of a moving train. Torpedos were handled by counsel and witnesses throughout the trial without incident.

B & O next submits that the manufacture of torpedos into "bombs" was not reasonably foreseeable. It notes that no such activity had occurred in the past to its knowledge. It acknowledges testimony indicating that management was aware of some horseplay occurring during the week preceding the accident. Specifically, there was evidence that a foreman broke up a rock battle. B & O submits that notice of conventional horseplay such as rock battles does not make the fabrication of "bombs" reasonably foreseeable.

Plaintiff submits that the

bomb-making activity was foreseeable. He calls the Court's attention to testimony that Mr. Criswell and his co-workers were not supervised during much of the week preceding the accident.

Mr. Criswell also testified that torpedos were widely available during that period and that he and the other men did not always have work to occupy them. He further indicated that a number of audible explosions occurred in the sandblast area in the days preceding the accident. He and other witnesses did agree, however, that the Brunswick yard was, in general, a noisy place and that management was located some distance from the sandblast area. There was no evidence that management ever heard one of these explosions from the office.

The Court finds there was insufficient evidence to prove an extraordinary event, such as the fabricating of "bombs," was reasonably foreseeable. Management's knowledge of conventional horseplay did not provide it with notice of Plaintiff's and his co-workers' activities. The lack of supervision similarly is insufficient reason for management to believe its workers would attempt to make explosive devices for their own entertainment. The Supreme Court has ruled that a railroad is guilty of negligence if it fails to prevent a reasonably foreseeable danger to an employee from intentional or criminal misconduct. See, Harrison v. Missouri Pacific Railway Co., 372 U.S. 248 at 249 (1963). Where intentional or criminal misconduct

is not foreseeable, however, courts have refused to hold the railroads liable. See, Brooks v. Washington Terminal Co., 493 F.2d 1285 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979) (assault on employee by co-employee not foreseeable; railroad held not liable); Green v. River Terminal Railway Co., 585 F. Supp. 1019 (N.D. Ohio 1984), to the same effect. The Court feels that this case falls into the latter category.

Secondly, The Issue Of Scope Of Employment. The B & O argues that Mr. Criswell did not prove a second necessary element for FELA recovery, that he was within the scope of his employment when the accident occurred. See 45 U.S.C. Sec. 51. Mr. Criswell testified that he had completed his assignment at the time the accident

occurred. He indicated that he was scavenging for scrap metal which he planned to use to construct a wood stove. The wood stove was for his personal use; he did not contend he was building the stove for B & O.

The FELA protects employees only if they are injured within the scope of their employment. Moore v. Chesapeake & Ohio Railway Co., 649 F.2d 1004 at 1008 (4th Cir. 1981). Scope of employment has been interpreted to encompass acts incidental to the employment as well as actual work. Fowler v. Seaboard Coastline Railway Co., 638 F.2d 17 at 20 (5th Cir. 1981). Incidental acts include eating lunch in the company cafeteria and walking to the job site on the employer's premises. Moore, 649 F.2d at 1010; Cailloutte v.

Baltimore & Ohio Chicago Terminal Railway, 705 F.2d 243, 246 (7th Cir. 1983). In contrast, a motorcycle excursion during lunch hour has been held to be outside the scope of employment. Fowler, 638 F.2d at 20. The proper test for scope of employment in a FELA case is whether the act was one which the employer might reasonable have foreseen and which the employee might reasonably have thought necessary in the interest of or in the benefit of the employer. Fowler, 638 F.2d at 20, citing, Texas and Pacific Railway v. Jones, 298 F.2d 188 (5th Cir. 1962).

Applying these principles to the facts of this case, the Court finds that Mr. Criswell's scavenging activities were not within the scope of his employment but were "purely private

activities totally unrelated to his employment." Fowler, 638 F.2d at 20.

For the foregoing reasons, the Court will grant the motion for judgment notwithstanding the verdict and will request that counsel for the Defendant prepare an appropriate order for the Court's consideration within ten days.

Thank you.

MR. DAVIS: Thank you, Your Honor.

(Whereupon, the hearing in the aforementioned case was concluded at 12:20 p.m.)

I hereby certify the foregoing

is a true and accurate excerpt from transcript of proceedings.

S.M. Lee Schap
Official Court
Reporter

No. 86-685

Supreme Court, U.S.
FILED
NOV
DEC 2
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES E. CRISWELL,

Petitioner,

v.

THE BALTIMORE & OHIO RAILROAD COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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No. 86-685

IN THE
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QUESTIONS PRESENTED FOR REVIEW

I. Whether the District Court correctly granted Respondent's Motion For Judgment Notwithstanding the Verdict where Petitioner produced no probative evidence upon which a reasonable jury could properly find that Respondent should have foreseen misconduct involving fabrication of explosive devices.

II. Whether the District Court correctly ruled that the company accident report authored and authenticated by Petitioner was not rendered inadmissible on the basis of Petitioner's testimony that he lied when narrating the report or Petitioner's contention that his report was on exculpatory device prohibited under 45 U.S.C. §55.

STATEMENT OF PARTIES TO THESE PROCEEDING

The Petitioner, James E. Criswell, an employee of The Baltimore and Ohio Railroad Company, at all relevant times, was the Plaintiff and Appellant below. The Baltimore and Ohio Railroad Company was the Defendant and Appellee below.

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No. 86-685

IN THE
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JAMES E. CRISWELL,

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v.

THE BALTIMORE & OHIO
RAILROAD COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
FOURTH CIRCUIT

LOWER COURT OPINIONS

The Bench Opinion and Order of Judge Herbert F. Murray of the United States District Court for the District of Maryland is unpublished and appears in

the Appendix. (App. 1a) The per curium Opinion of Senior Circuit Judge Clement F. Haynsworth, Jr., Circuit Judge Robert F. Chapman and Circuit Judge J. Harvie Wilkinson is unpublished and appears in the Appendix. (App. 13a)

STATEMENT OF THE CASE

Petitioner Criswell brought suit against his railroad employer, Respondent, The Baltimore and Ohio Railroad Company, under the Federal Employers' Liability Act (FELA), 45 U.S.C. §51 et seq. premised upon a bizarre and unfortunate incident at the B&O's Brunswick, Maryland Car Repair Shop on December 11, 1981. Criswell and several of his co-workers were engaged in unauthorized horseplay, making explosive devices using powder from signal torpedos (small explosive charges placed by track person-

nel on the tracks to warn of approaching trains) when one of the fabricated devices unexpectedly exploded while Petitioner was handling it and cost him his left hand. At the time, James Criswell repeatedly acknowledged his culpability, but later concocted a new version of the occurrence in an attempt to impose liability upon the Railroad.

The case proceeded to trial from April 19, 1985 to May 2, 1985 before District Judge Murray and a jury. The jury returned a verdict on special interrogatories finding that Criswell's negligence had contributed eighty-eight percent (88%) to the happening of the accident and that the B&O's negligence was twelve percent (12%) responsible for the mishap. The effect of the jury's finding was to reduce the total monetary verdict

of $500,000.00 to a net award of $60,000.00.

Subsequent to trial, Appellee filed a motion for judgment notwithstanding the verdict which after hearing on June 7, 1985 was granted by Judge Murray. Issuing a bench opinion, the District Judge held that, viewing the evidence most favorable toward Criswell, there was sufficient evidence from which the jury could infer that the Railroad did not exercise reasonable care in storing the torpedos. But Judge Murray ruled that "there was insufficient evidence to prove an extraordinary event, such as the fabrication of 'bombs', was reasonably foreseeable." Other grounds relied upon by Criswell likewise were held deficient. "The [alleged] lack of supervision similarly is insufficient reason for management to believe its workers

would attempt to make explosive devices for their own entertainment." Furthermore, Judge Murray considered that, even accepting Criswell's contrived, second version of the incident as true, Criswell's activities at the time of his injury were outside the scope of his employment.

Criswell thereafter filed a timely Notice of Appeal. The United States Court of Appeals for the Fourth Circuit, in a per curium, unpublished opinion, affirmed the lower court's decision on the basis of lack of foreseeability, holding that: "Because the district court properly found that the fabrication of bombs was not reasonably foreseeable, the railroad cannot be held negligent even when we take the facts in the light most favorable to the plaintiff." There-

after, Criswell filed a timely Petition for Writ of Certiorari.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED RESPONDENT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WHERE PETITIONER PRODUCED NO PROBATIVE EVIDENCE UPON WHICH A REASONABLE JURY COULD PROPERLY FIND THAT RESPONDENT SHOULD HAVE FORESEEN MISCONDUCT INVOLVING FABRICATION OF EXPLOSIVE DEVICES.

Respondent submits that the testimony at trial overwhelmingly proved that Criswell fabricated the explosive device which cost him his hand and accordingly was the author of his own misfortune. Criswell was the admitted instigator and active participant in manufacturing these devices. The contrived testimony given by Criswell that he had discontinued his involvement in the misconduct and subsequently found the fabricated device which then unexpectedly exploded, without his

knowing its nature, was unworthy of belief. Even if a rational jury could have believed Criswell's concocted account of the accident, however, the trial court correctly granted the judgment notwithstanding the verdict. Viewing the evidence most favorably towards Criswell, Petitioner failed to produce sufficient evidence upon which a reasonable jury could properly find that the B&O should have foreseen that misconduct involving fabrication of explosive devices would occur.

During the week of the accident, Criswell and his co-workers were assigned duties retrofitting box cars in an extensive outdoor area called the car repair shop. The uncontradicted testimony of all the witnesses was that the shop crew members, including Criswell, had ample work to keep them busy and

were expected and able to perform their duties without constant supervision.

According to Criswell, during the early part of the week, he chose to divert himself with various pranks and horseplay on the purported ground that his co-worker, William Wilson, did not want to work and stated that Criswell should "hang loose."[1] For entertainment, Criswell and Wilson initiated making explosive devices out of nuts and bolts, and powder scraped from torpedos obtained by Wilson as the explosive charge. Criswell, by his own account,

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1. Although Petitioner has characterized William Wilson as a gang leader, he, in fact, was a co-worker who when working in tandem with Criswell. Wilson was denominated the "leader" for the mere purpose of coordinating their movement. Significantly, Criswell did not arrange to have William Wilson testify and accordingly all reference to Wilson's statements was hearsay.

continued in the bombing activities for several days and was later joined by his other co-workers, James Martz and Jeffrey Tribby.

After admittedly having started the misconduct, Criswell testified that he disassociated himself from the activity and decided to scavenge for parts to build a wood stove for his personal use. By happenstance, he stumbled across the device - which he insinuated in his trial testimony had been made by someone else - and not knowing what it was, proceeded to carry it about and to examine it, until it mysteriously exploded as he was entering a box car. Every other witness' testimony, with one possible exception, was to the effect that Criswell was the manufacturer of the device which

eventually exploded in his hand.[2]

The only witness Criswell called to testify in corroboration of his story was a laborer who usually worked as a car cleaner, William Brown, Jr. But Brown's testimony was so at odds with Criswell's own account of the incident as to make it unworthy of belief. Brown testified that he was located inside of the box car moments before the incident. Unaccountably, no one, including Criswell, recalled Brown being there. Equally puzzling, Brown disappeared before the explosion occurred.

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2. Other aspects of Criswell's story were likewise discredited. Criswell testified that he showed the device upon finding it to a friend, David McLane, who testified however that this incident did not occur. Criswell further testified that he intended to inquire of James and David Martz whether the device was suitable as a part for a woodstove. The Martz brothers testified that they did not know how to build a woodstove.

In granting the B&O's motion for judgment notwithstanding the verdict, the trial court more than generously viewed the evidence in Criswell's favor. The trial court went so far as to hold that it was possible for a jury to find that the B&O was negligent in storing the torpedos, in that, a few unspent torpedos had allegedly been found along the main track, an area located far from Criswell's workplace. The trial court acknowledged, nonetheless, the uncontroverted evidence that torpedos were a necessary device for safe operation of a railroad used by track crews to warn on-coming trains of the presence of non-functioning trains and/or employees working on the tracks. Moreover, Criswell did not dispute that a torpedo could be safely handled and would only

explode when grossly misused by striking it with tremendous force.

Criswell now contends that the trial court erred in holding that it was not foreseeable that he and his co-workers would fabricate bombs, although he produced no probative evidence that the B&O actually knew or had any reason even to suspect that such misconduct was occurring.

Criswell himself admitted that the bombing activities would cease whenever supervisory personnel were near. And Criswell admitted that he did not actually know whether the explosions could be heard in the superintendent's office located a far distance across the yard. Moreover, the explosions were masked by the sounds of hammering, drilling and other work being performed at the facility.

Lacking any direct evidence, Criswell asked the court and jury to believe that the B&O's management should have foreseen that, by leaving Criswell and his co-workers unsupervised at times during the day, they would fabricate bombs. The only evidentiary support for Criswell's contention was controverted testimony that the B&O's management had knowledge of an alleged, minor incident of stone-throwing.

Respondent submits that Criswell's scant evidence, of marginal probative value at best, was insufficient for a reasonable jury to find that the bomb-making activities were foreseeable.

The judgment in favor of Appellee must stand because the willful, dangerous acts of Criswell and his co-workers were not foreseeable links in the causative chain of events, directly and proximately

resulting from the allegedly negligent storage of the torpedos. Reasonable foreseeability of harm indisputably is an essential ingredient of liability under the FELA, of course.

The issue of foreseeability of the negligent use of equipment was addressed by this Court in Brady v. Southern Ry. Co., 320 U.S. 476, 64 S.Ct. 232 (1943), affirming, in favor of the railroad, the grant of judgment notwithstanding the verdict. This Court held that each event leading up to and including the accident must have been foreseeable to impose FELA liability, and that an employer is not required to foresee and guard against "remote events" and "bare possibilities", including use of equipment which is "unusual" and contrary to the purpose of the equipment. (Id.)

Likewise, the B&O had no duty to foresee that Criswell and his co-workers would deliberately fabricate explosive devices from torpedos, a device for which they had no use in performing their duties and which were geographically located far from their workplace.

In an identical vein, lack of foreseeability led this Court in Inman v. Baltimore & Ohio Railroad Co., 361 U.S. 194, 80 S.Ct. 242 (1959), to hold that the evidence was insufficient even to raise a question for the jury's consideration regarding the foreseeability of the willful acts of misconduct of a motorist who failed to obey a stop sign and hit petitioner. This Court held that, in the absence of similar occurrences and complaints, the accident could not have been foreseeable. Moreover, evidence that motorist had previously

"jumped the gun" at this intersection was not deemed to constitute a "similar occurrence".

Likewise, Criswell produced no evidence of similar occurrences of tampering with torpedos, but merely produced contradicted testimony of horseplay involving stone-throwing. Under the analysis of Inman, the alleged incident of stone-throwing was not a similar occurrence to warrant a finding that the B&O should have foreseen that Criswell and his co-workers would fabricate bombs.

Furthermore, contrary to Criswell's contention, this Court's holding in Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, 83 S.Ct. 659 (1963), supports affirmance of the judgment notwithstanding the verdict here at issue. Although this Court held that the severe disabling consequences of an

injury need not be foreseeable, it unequivocally held that foreseeability of the incident itself is an "essential ingredient" of FELA negligence. (372 U.S. at 117, 83 S.Ct. at 665)

Here the essential ingredient of Criswell's burden of proof was to show that the fabrication of bombs was foreseeable -- a burden that Criswell did not meet under the holding of Brady, supra, and Inman, supra.

Accordingly, the grant of judgment notwithstanding the verdict was properly entered under the standard set forth by this Court that: Where there is insufficient probative evidence from which a reasonable jury could properly find for the plaintiff, the case may not be submitted to the jury. (Inman, supra, 361 U.S. at 140, 80 S.Ct. at 243; and Brady,

supra, 320 U.S. at 479-480, 64 S.Ct. at 234).

> "It has repeatedly been held by the highest authority that before evidence may be left to the jury there is a preliminary question for the trial judge, which is not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." (Emphasis supplied)

(Redman v. Baltimore & Carolina Line, 70 F.2d 635, 637 (2nd Cir. 1934) (aff'd with modification to direct a judgment of dismissal on the merits. 295 U.S. 654, 55 S.Ct. 890 (1935)) See also Pennsylvania R. Co. v. Chamberlain, 288 U.S. 333, 55 S.Ct. 391 (1933) (A jury cannot "properly" find for the plaintiff on the basis of overwhelmingly incredible evidence.)

The overwhelming evidence in the instant case was that Criswell fabricated the device and thereby caused his own misfortune. Balt. and Potomac R.R. Co. v. Jones, 95 U.S. 506 (1877) (It would have been error to have refused to direct the verdict.) And even if Criswell's concocted version of the incident could have been believed, there was insufficient evidence for a reasonable jury to properly find that the fabrication of bombs was a foreseeable event. Accordingly, the trial court correctly entered judgment notwithstanding the verdict.

II. THE DISTRICT COURT CORRECTLY RULED THAT THE COMPANY ACCIDENT REPORT AUTHORED AND AUTHENTICATED BY PETITIONER WAS NOT RENDERED INADMISSIBLE ON THE BASIS OF PETITIONER'S TESTIMONY THAT HE LIED WHEN NARRATING THE REPORT OR PETITIONER'S CONTENTION THAT HIS REPORT WAS AN EXCULPATORY DEVICE PROHIBITED UNDER 45 U.S.C. §55.

Prior to trial, Counsel for Criswell moved to exclude from evidence a standard company accident report, known as a Chessie System Form CJ-68. It contained a statement of how the accident occurred, as narrated by Criswell, written out for him by Richard Mullen, Superintendent of the Car Repair Shop, and then signed by Criswell. Criswell's statement, in effect, was that while he was adjusting the device with a wrench to make it explode when thrown against a box car, it suddenly exploded. Counsel for Petitioner argued that the CJ-68 form was inadmissible on the basis that Criswell testified during deposition that he lied to Mullen for the purpose and with the effect of allegedly deceiving him.

Criswell seeks review by this Court of the issues whether his uncorroborated,

self-serving testimony that he lied when admitting fault rendered his admission inadmissible and whether the CJ-68 form which was narrated by him was an exculpatory device in violation of 45 U.S.C. §55.

The trial court properly admitted the CJ-68 form into evidence. The document and Criswell's signature were authenticated by Criswell himself in accordance with Federal Rule of Evidence 901(b)(1). Moreover, Criswell testified that the statement was based upon his narration to Mullen and the form was read to him by Mullen before he signed it. Under Federal Rule of Evidence 801(d), therefore, the CJ-68 form was admissible as a prior inconsistent statement or as an admission.

The trial court properly held that evidence discrediting the document went

to the weight -- not the admissibility of the document. Criswell was afforded the opportunity to present evidence that he "made up" the story blaming himself for the accident. The jury apparently found Criswell's uncorroborated trial testimony to be inherently incredible in light of his repeated admissions of fault up until the time he decided to file suit. Immediately after the accident, Criswell said: "I screwed up", as testified by David Martz. Two days later, when David and James Martz visited Criswell at the hospital, he again expressly acknowledged his fault and stated that the device exploded while he was adjusting it with a wrench. The self-serving testimony of Criswell at trial, denying the truth of the statement he admits having made, is not grounds for excluding the CJ-68 form.

As for Criswell's legal objection to the CJ-68 form, his arguments are equally deficient. The relevant passage of Section 55 relied upon by Criswell provides:

> "Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void." (Emphasis supplied.)

(45 U.S.C. §55)

The practice which Congress intended to prohibit by enacting Section 55 was the use of employment contracts exempting the railroad from liability, and releases from liability, but only when obtained by fraudulent and over-reaching devices. See South Buffalo Ry. Co. v. Ahern, 344 U.S. 367, 73 S.Ct. 340 (1953).

Moreover, the prohibition of Section 55 is expressly limited to "exemption"

from liability. The CJ-68 form did not contain an exemption clause. To the contrary, Criswell was free to make any statement he chose. The fact that Criswell decided to make an admission against interest does not convert the statement from ordinary evidence into a device exempting the railroad from liability.

There is no indication of a Congressional intent underlying Section 55 to construe the provision as a species of evidentiary shackles, precluding railroads from defending themselves in litigation. In fact, this Court implicitly approved of the admissibility of a strikingly similar accident report in Redman, supra. The petitioner in Redman likewise gave two accounts of how he came to have gangrene, narrating an accident report to the railroad's claim agent in which he said that he had a pre-existing

condition and testifying at trial that, as a result of the shipowner's negligence, he stepped on a nail.

The fact that petitioner's second account was uncorroborated, coupled with the accident report, led the trial court to hold that no reasonable jury could properly find in favor of petitioner. (70 F.2d at 637.) This Court in Redman, in whole-hearted affirmance of the trial court's holding, modified the judgment by ordering entry of a verdict in favor of the railroad on the merits. See also Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943) (Implicitly holding that an accident report is not a device in violation of Section 55, but holding that the report is not admissible as a "business record".)

Petitioner therefore raises no new issues of statutory construction arising

under 45 U.S.C. §55. This Court has implicitly held that an accident report is outside the scope of Section 55.

CONCLUSION

For the foregoing reasons, The Baltimore & Ohio Railroad Company respectfully requests that this Honorable Court deny Petitioner's Request for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No.
HM-84-752

JAMES E. CRISWELL

Plaintiff

v.

THE BALTIMORE & OHIO
RAILROAD COMPANY

Defendant

BENCH OPINION

EXCERPT FROM TRANSCRIPT PROCEEDINGS

THE COURT: Presently pending in this Federal Employers' Liability Act ("FELA"), 45 U.S.C. Sec. 51 et seq. case is Defendant Baltimore and Ohio Railroad Company's motion for judgment notwith-

standing the verdict. Plaintiff James E. Criswell opposes the motion. The Court has held a hearing on the matter on Friday, June 7, 1985 and is now prepared to rule. For the reasons stated herein, the Court will grant that Defendant's motion.

Mr. Criswell is a former employee of Defendant B&O. He worked as a carman-welder at Defendant's yard in Brunswick, Maryland. On December 11, 1981, a home-made "bomb," fabricated from a pipe sleeve and torpedo powder, exploded in Mr. Criswell's hand. Mr. Criswell subsequently underwent a hand amputation because of the severity of his injury. He brought the instant case against B&O to recover for those injuries.

The jury trial in this matter began on April 29, 1985 and concluded May 2, 1985. After brief deliberations, the

jury returned a verdict for Plaintiff for $500,000. The Court subsequently entered judgment for Mr. Criswell for $60,000, or twelve percent of the $500,000 verdict, pursuant to the jury's determination that Plaintiff was 88 percent, and Defendant 12 percent responsible for the accident. By the instant motion, B&O seeks entry of judgment in its favor.

The commentators indicate that the stringent standards for judgment notwithstanding the verdict pursuant to F. R. Civ. P. 50 are even more difficult to meet in an FELA case. See 9 C. Wright & A. Miller, Federal Practice and Procedure, Sec. 2526. For example, the Supreme Court has held that so long as there is evidence from which an inference might rationally be drawn, either about how the accident happened or about

whether the Defendant's conduct was negligent, it is for the jury to accept or reject that inference, even though the inference may be quite an improbable one. See Lavender v. Kurn, 327 U.S. 645, 652 to 53 (1946). Citing an earlier Supreme Court case, the District of Columbia Circuit has observed:

"The test whether an FELA case should be submitted to the jury 'is simply whether the proofs justify with reason the conclusion that the employer's negligence played any part, even the slightest, in producing the injury or death for which damages are sought'." Brooks v. Washington Terminal Co., 593 F.2d 1285 at 1288 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979), quoting, Rogers v. Missouri Pacific Railway, 352 U.S. 500 at 506 (1957).

Recognizing the difficult standard it must meet, the B&O nonetheless argues that Plaintiff failed to prove two necessary elements of an FELA case, that he was acting within the scope of his employment and the B&O was negligent. I'll deal first with the issue of negligence.

B&O first asserts that the evidence, when viewed in the light most favorable to the Plaintiff, indicates that it used reasonable care in storing the torpedos. It notes that torpedos have a legitimate safety purpose, to wit: to warn track work crews of an oncoming train. It also asserts that the torpedos were kept in locked cabooses and in a guarded store room. The Court notes that there was also evidence that unauthorized employees had keys to the cabooses, that torpedos were lying near the main track in the

Brunswick yard, and the torpedos were sometimes left in unlocked Amtrack passenger cars. Viewing the evidence in the light most favorable to Mr. Criswell, the Court finds that a jury could rationally infer that B&O did not use reasonable care in storing the torpedos.

Assuming the torpedos were available to unauthorized persons, such as Mr. Criswell and his co-workers, B&O argues this availability did not create an unreasonably dangerous workplace. B&O's uncontradicted testimony showed that the torpedos are not inherently dangerous equipment requiring special handling. They explode only if struck with force such as by the wheel of a moving train. Torpedos were handled by counsel and witnesses throughout the trial without incident.

B&O next submits that the manufacture of torpedos into "bombs" was not reasonably foreseeable. It notes that no such activity had occurred in the past to its knowledge. It acknowledges testimony indicating that management was aware of some horseplay occurring during the week preceding the accident. Specifically, there was evidence that a foreman broke up a rock battle. B&O submits that notice of conventional horseplay such as rock battles does not make the fabrication of "bombs" reasonably foreseeable.

Plaintiff submits that the bomb-making activity was foreseeable. He calls the Court's attention to testimony that Mr. Criswell and his co-workers were not supervised during much of the week preceding the accident. Mr. Criswell also testified that torpedos were widely available during that period and

that he and the other men did not always have work to occupy them. He further indicated that a number of audible explosions occurred in the sandblast area in the days preceding the accident. He and other witnesses did agree, however, that the Brunswick yard was, in general, a noisy place and that management was located some distance from the sandblast area. There was no evidence that management ever heard one of these explosions from the office.

The Court finds there was insufficient evidence to prove an extraordinary event, such as the fabricating of "bombs", was reasonably foreseeable. Management's knowledge of conventional horseplay did not provide it with notice of Plaintiff's and his co-workers' activities. The lack of supervision similarly is insufficient reason for manage-

ment to believe its workers would attempt to make explosive devices for their own entertainment. The Supreme Court has ruled that a railroad is guilty of negligence if it fails to prevent a reasonably foreseeable danger to an employee from intentional or criminal misconduct. See Harrison v. Missouri Pacific Railway Co., 372 U.S. 248 at 249 (1963). Where intentional or criminal misconduct is not foreseeable, however, courts have refused to hold the railroads liable. See Brooks v. Washington Terminal Co., 493 F.2d 1285 (D.C. Cir.), cert. denied, 442 U.S. 910 (1979) (assault on employee by co-employee not foreseeable; railroad held not liable); Green v. River Terminal Railway Co., 585 F. Supp. 1019 (N.D. Ohio 1984), to the same effect. The Court feels that this case falls into the latter category.

Secondly, The Issue Of Scope Of Employment. The B&O argues that Mr. Criswell did not prove a second necessary element for FELA recovery, that he was within the scope of his employment when the accident occurred. See 45 U.S.C. Sec. 51. Mr. Criswell testified that he had completed his assignment at the time the accident occurred. He indicated that he was scavenging for scrap metal which he planned to use to construct a wood stove. The wood stove was for his person use; he did not contend he was building the stove for B&O.

The FELA protects employees only if they are injured within the scope of their employment. Moore v. Chesapeake & Ohio Railway Co., 649 F.2d 1004 at 1008 (4th Cir. 1981). Scope of employment has been interpreted to encompass acts incidental to the employment as well as

actual work. Fowler v. Seaboard Coast-line Railway Co., 638 F.2d 17 at 20 (5th Cir. 1981). Incidental acts include eating lunch in the company cafeteria and walking to the job site on the employer's premises. Moore, 649 F.2d at 1010; Cailloutte v. Baltimore & Ohio Chicago Terminal Railway, 705 F.2d 243, 246 (7th Cir. 1983). In contrast, a motorcycle excursion during lunch hour has been held to be outside the scope of employment. Fowler, 638 F.2nd at 20. The proper test for scope of employment in a FELA case is whether the act was one which the employer might reasonably have foreseen and which the employee might reasonably have thought necessary in the interest of or in the benefit of the employer. Fowler, 638 F.2d at 20, citing, Texas and Pacific Railway v. Jones, 298 F.2d 188 (5th Cir. 1962).

Applying these principles to the facts of this case, the Court finds that Mr. Criswell's scavenging activities were not within the scope of his employment but were "purely private activities totally unrelated to his employment." Fowler, 638 F.2d at 20.

For the foregoing reasons, the Court will grant the motion for judgment notwithstanding the verdict and will request that counsel for the Defendant prepare an appropriate order for the Court's consideration with ten days.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Civil Action No.

85-1769

JAMES E. CRISWELL

Appellant

v.

THE BALTIMORE & OHIO
RAILROAD COMPANY

Appellee

PER CURIAM OPINION

This case is the result of a tragic accident at a railroad car repair shop. During a slack period in the shop's operations, some workers amused themselves by making small pipe bombs with powder from signal torpedoes, which are explosive charges used to warn of oncom-

ing trains. On December 11, 1981, one of the pipe bombs exploded in the hands of James Criswell, a welder at the repair shop. As a result, Criswell lost his left hand.

Criswell sued the railroad under the Federal Employers' Liability Act. Following a jury trial, the district court awarded $60,000 to Criswell. The railroad then moved for a judgment notwithstanding the verdict. The district court granted the railroad's motion on the grounds that the fabrication of bombs at the repair shop was not reasonably foreseeable and that the accident occurred when Criswell was acting outside the scope of his employment, scavenging metal part for his own use.

Criswell now appeals on a variety of grounds. We reach only the issue of foreseeability, however. Because the

district court properly found that the fabrication of bombs was not reasonably foreseeable, the railroad cannot be held negligent even when we take the facts in the light most favorable to the plaintiff. We therefore affirm the decision of the district court. James E. Criswell v. The Baltimore & Ohio Railroad Co., C/A NO.85-1769 (D. Md. June 7, 1985).

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